No. 04-10566

IN THE

Supreme Court of the United States

MOISES SANCHEZ-LLAMAS,

Petitioner,

vs.

STATE OF OREGON,

Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Does the Vienna Convention convey individual rights of consular notification and access to a foreign detainee enforceable in the courts of the United States?

2. Does the state's failure to notify a foreign detainee of his rights under the Vienna Convention result in the suppression of his statements to police?

This brief *amicus curiae* addresses only Question 2.

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

In this case, petitioner seeks to suppress evidence on a ground which has little, if anything, to do with the reliability of that evidence. He seeks it in a case where it is doubtful whether the violation at issue occurred prior to his statement

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

and where he probably would have made his statement even if given the requisite advisement immediately upon arrest. Nothing in the Vienna Convention or the International Court of Justice decision requires suppression of such a statement, and the resulting interference with the truth-seeking function of the trial is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

We take the facts pertinent to the issues in this brief primarily from the Brief for Petitioner. In the early morning of December 18, 1999, police responded to a call that defendant, while heavily intoxicated, had threatened two women with a gun. Brief for Petitioner 3. The police ordered defendant to drop the gun, but he exchanged gunfire with the police, wounding one of them in the leg. He was then arrested, some time between 3:00 a.m. and 3:48 a.m. See *ibid.*

Defendant was questioned at 4:36 a.m. The police used an interpreter and advised him of his *Miranda* rights. See *id.*, at 3-4. Defendant contends that the police learned that he was a Mexican national at this time, but they did not inform him that he had a right to notify the Mexican Consulate. See *id.*, at 6. The State disputes that the police learned of his nationality prior to questioning. Brief for Respondent 4-5. Questioning was interrupted at times for medical care and lunch. It concluded at 12:45 p.m. See Brief for Petitioner 4-5. That is approximately eight hours after defendant claims the police learned he was a Mexican national.

At trial, defendant moved to suppress his statements on *Miranda*, due process, and Vienna Convention grounds. The trial court denied the motion. The Court of Appeals affirmed without opinion. See *id.*, at 6-7; *State* v. *Sanchez-Llamas*, 191 Ore. App. 399, 84 P. 3d 1133 (2004) (Table). The Oregon Supreme Court granted discretionary review, limited to the Vienna Convention issue. See *State* v. *Sanchez-Llamas*, 338 Ore. 267, 269, and n. 2, 108 P. 3d 573, 574, and n. 2 (2005).

The court "conclude[d] that Article 36 of the VCCR does not create rights to consular access or notification that are enforceable by detained individuals in a judicial proceeding." *Id.*, at 276, 108 P. 3d, at 578. This Court granted certiorari on November 7, 2005, limited to the Vienna Convention issue and excluding the Fifth/Fourteenth Amendment claim.

SUMMARY OF ARGUMENT

The statements of petitioner which were introduced as evidence in this case were not the "fruit" of the violation of the Vienna Convention. Notification of the consulate was not yet due at the time of the statement. Informing the defendant of his right to notice may or may not have been overdue at that time, but in any event would have been highly unlikely to have made any difference in his decision to make the statement. No prejudice has been shown within the meaning of *Avena*.

Suppression of valid, probative evidence as a means of influencing police behavior is a discredited relic of a bygone era. Although the *Mapp* and *Miranda* rules hang on by virtue of *stare decisis*, they should not be expanded.

A consensus of decisions from courts of other parties to the Vienna Convention that a violation requires suppression would be valid persuasive authority that suppression is a treaty obligation of the United States, but no such consensus exists. *None* of the cases cited by *amici* NACDL & LCA so hold, and *amicus* CJLF has found none. The dearth (and possibly complete absence) of such authority implies the opposite. The treaty does not require suppression of arrestee statements. Absent a requirement in the treaty, a federal statute, or the Constitution itself, this Court has no jurisdiction to impose the requirement on state courts.

ARGUMENT

This case and the companion case of *Bustillo* v. *Johnson*, No. 05-51, raise questions of whether the Vienna Convention on Consular Relations creates rights enforceable in state criminal prosecutions and whether the Optional Protocol to that convention obligates state courts to follow the decision of the International Court of Justice in *Case Concerning Avena and other Mexican Nationals* (*Mex.* v. *U. S.*), 2004 I. C. J. No. 128 (Judgment of Mar. 31), (cited below as "*Avena*"). *Amicus* CJLF believes that these points will be fully presented in other briefs in these cases and therefore will not argue them here. See Supreme Court Rule 37.1.

This brief will address Question 2 in the *Sanchez-Llamas* case, whether suppression of the defendant's statement, despite its voluntary nature and compliance with the *Miranda* rule,[2] is required by *Avena*.

Admission of his statements is the only prejudice petitioner claimed in his petition for certiorari, and retrial without them is the only remedy he asked. See Pet. for Cert. 25-27. If the violation petitioner claims would not entitle him to the remedy he seeks, it may not be necessary to answer the first question; the Court may take them in either order. See *Strickland* v. *Washington*, 466 U. S. 668, 697 (1984).

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2. *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Although petitioner disputes that the obtaining of the statement complied with federal constitutional requirements, this issue was resolved against him in the state trial and intermediate appellate courts, and both the Oregon Supreme Court and this Court denied discretionary review. See *supra*, at 2. For the purpose of this brief, therefore, *amicus* will treat *Miranda* compliance as given.

I. Petitioner's statements were not the "fruit" of a Vienna Convention violation.

The *Avena* decision is best known for the holding of the International Court of Justice (ICJ) that the procedural default rule cannot bar a Vienna Convention claim when the default occurred before the consulate had knowledge of the case. See *Avena*, ¶ 113;[3] cf. *Breard* v. *Greene*, 523 U. S. 371, 376 (1998) (*per curiam*). However, the ICJ rejected many of Mexico's claims regarding the nature of the Vienna Convention notification requirement and the consequences of noncompliance.

Most importantly, the court rejected the claim that "partial or total annulment of conviction or sentence provides the necessary and sole remedy" for a violation of the treaty. *Avena*, *supra*, ¶ 123. Instead, a causal connection must be shown that "the violations . . . ultimately led to convictions and severe penalties . . . ." *Id.*, ¶ 122. In other words, the burden is on the petitioner to show "actual prejudice." *Id.*, ¶ 121. In this aspect, *Avena* is entirely consistent with *Breard*'s alternative holding, that even if a Vienna Convention claim is properly raised and a violation proved, relief from the criminal judgment requires "a showing that the violation had an effect on the trial." *Breard*, 523 U. S., at 377.

The *Avena* decision rejected Mexico's claim that in any retrial after the finding of a violation, any statement or confession obtained prior to notification to the arrestee of his consular rights must be suppressed. Instead, the confession issue is to be considered in each case as a part of the review process. *Avena*, *supra*, ¶¶ 126-127. That means a causal connection between the violation and obtaining the confession. In American exclusionary rule parlance, the confession must be the

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3. *Avena* did not hold that the procedural default rule cannot apply to defaults occurring after the consulate has been notified or otherwise gained knowledge of the case. The present case does not involve a default, and *Bustillo* involves a prenotification default. See Brief for Petitioner in *Bustillo* v. *Johnson*, No. 05-51, pp. 8-9.

"fruit of the poisonous tree." See, *e.g.*, *United States* v. *Patane*, 542 U. S. 630, 635 (2004) (plurality opinion).

Obviously, there is no causal connection when the statement or confession precedes the violation. Article 36, paragraph 1(b), requires that the arrestee be informed of his rights "without delay," and if he requests notification, the consulate must be notified "without delay." See *Avena*, *supra*, ¶ 50. The ICJ rejected the claim that notice to the arrestee necessarily precede interrogation. *Id.*, ¶ 85. During preparation of the Convention, suggested time periods for notification ranged from a minimum of 48 hours up to one month, and the ICJ rejected the argument that the adopted term "without delay" meant " 'immediately' upon arrest." *Id.*, ¶¶ 86-87. Without further explanation, though, the ICJ nonetheless found a duty to inform the arrested person as soon as he is known to be a foreign national or there are grounds to think he probably is. *Id.*, ¶ 88. The ICJ goes on to find a violation in the case of an arrestee whose birthplace was stated in the arrest report and who was informed 40 hours later. *Id.*, ¶ 89.

Whether the duty to inform is overdue eight hours after learning of the arrestee's nationality, when petitioner says the questioning was concluded in the present case, is not squarely resolved by this confusing and self-contradictory passage. Even assuming that information was overdue, however, there is no comparable requirement of immediacy regarding actually notifying the consulate.

> "Mr. Hernández (case No. 34) was arrested in Texas on Wednesday 15 October 1997. The United States authorities had no reason to believe he might have American citizenship. The consular post was notified the following Monday, that is five days (corresponding to only three working days) thereafter. The Court finds that, in the circumstances, the United States did notify the consular post without delay, in accordance with its obligation under Article 36, paragraph 1 (b)." See *Avena*, *supra*, ¶ 97.

Unlike the *Miranda* rule, the Vienna Convention notification provisions were not drafted with interrogation in mind. "[D]uring the Conference debates on this term, no delegate made *any connection* with the issue of interrogation." *Avena*, *supra*, ¶ 87 (emphasis added); cf. *Miranda* v. *Arizona*, 384 U. S. 436, 445 (1966) (deciding admissibility of statements obtained during custodial interrogation). Unlike a request for counsel under *Miranda*, there is no requirement under *Avena* to refrain from interrogation until a request for consular notification has been fulfilled. *Avena*, *supra*, ¶ 87; cf. *Miranda*, *supra*, at 473-474. Also unlike *Miranda*, there is no waiver to be made as a condition for interrogation. Cf. *Miranda*, *supra*, at 479.

Because consular notification is a matter of timing unrelated to the taking of the statement, it is more like the prompt appearance requirement than the *Miranda* requirement. *United States* v. *Mitchell*, 322 U. S. 65, 69-70 (1944) held that a statement made promptly upon arrest was not rendered inadmissible under *McNabb* v. *United States*, 318 U. S. 332 (1943) by a subsequent violation of the prompt appearance rule. Similarly, if consular notification is not overdue when a statement is taken, the fact that the notification is not made when it later becomes due has no causal connection to the making of the statement, and the subsequent violation is no ground for suppression.

Given a proper administration of *Miranda* warnings, a knowing and voluntary waiver of the right to have counsel during interrogation, and interrogation taking place promptly after arrest, there will rarely, *if ever* be a causal connection between failure to give the consular information before interrogation and obtaining the statement. Indeed, if the statement and the information of nationality are obtained in the same interview, or if nationality is learned later, there is no violation at all.

In the present case, Sanchez-Llamas made his statements within a few hours of arrest. The Consul General says the

consulate will advise every arrestee to remain silent if the *consulate* is notified prior to interrogation, see App. to Pet. for Cert. 28, but such swift notification of the consulate (as opposed to the arrestee) is not required by *Avena*. Even if failure to inform petitioner himself was a violation, a causal connection between that violation and the statements is every bit as speculative as the one rejected in *Breard*. Cf. 523 U. S., at 377.

Petitioner asserts that he was unable to understand the *Miranda* warnings, because the concept of rights in the warnings is unknown where he comes from, a place where he greatly feared the police. Brief for Petitioner 6. Informing the petitioner that he had the right to notify the very government that he had learned not to expect *any* protection from was not likely to change his decision on how to deal with the police in this case.

No causal connection has been shown between the Vienna Convention violation in this case and the outcome. Hence, there is no showing of "prejudice" within the meaning of *Avena*.

II. Suppression of evidence is a disfavored remedy and should not be expanded without exceptionally compelling justification.

Petitioner makes the sweeping claim that evidence must be suppressed whenever it is obtained in violation of any "law that creates or safeguards individual rights." Brief for Petitioner 35 (capitalization omitted). In reality, as we will show, the exclusion sanction is much narrower than that, and this Court has made it progressively narrower over the last three decades. *Amici* National Association of Criminal Defense Lawyers and Law Counsel of Australia (NACDL/LCA) are even more expansive, calling suppression of evidence a "time-honored remedy." NACDL/LCA Brief 5. This assertion requires a very selective view of time. It has a Rip Van Winkle quality about

it, as if *amici* slept through the entire Burger and Rehnquist Court eras. During that period, exclusionary rules have been anything but "honored." They have been recognized as unjust and unjustified, and they have been limited by this Court, by Congress, and by the States.

The requirement of the Fourth Amendment that warrants issue only on probable cause is certainly a law that safeguards individual rights, yet evidence obtained in violation of this requirement is not suppressed if police relied on the warrant in good faith. See *United States* v. *Leon*, 468 U. S. 897, 920-922 (1984). The same is true if the officer relied on a statute later held unconstitutional. See *Illinois* v. *Krull*, 480 U. S. 340, 349-350 (1987). In *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U. S. 357, 363-365, and n. 4 (1998), the Court reviewed these and other instances where it had narrowed or refused to broaden the exclusionary rule, sanctioning the use of unconstitutionally obtained evidence in grand jury proceedings, in tax cases, in deportation proceedings, when a third person's rights are asserted, and for impeachment. *Scott* itself held that such evidence was admissible in parole revocation hearings. See *id.*, at 364.

Finding the truth is the essential purpose of a trial, see *United States* v. *Havens*, 446 U. S. 620, 626 (1980), and rules which exclude evidence without regard to its reliability are contrary to that purpose. See *Stone* v. *Powell*, 428 U. S. 465, 490 (1976). *Mapp* v. *Ohio*, 367 U. S. 643 (1961) may be too deeply ingrained at this point to overrule. Repeated calls to replace it with a civil remedy, see, *e.g.*, *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 424 (1971) (Burger, C. J., dissenting); Slobogin, Why Liberals Should Chuck the Exclusionary Rule, 1999 U. Ill. L. Rev. 363, go unheeded by Congress, probably because Congress cannot risk creating an expensive alternative without an assurance it will be accepted as such. Though we are stuck with *Mapp*, this Court should, and for three decades largely has, "decline[d] to go beyond it,

even by a fraction of an inch." Cf. *Silverman* v. *United States*, 365 U. S. 505, 512 (1961).

The other massive but dubious exclusionary rule is, of course, *Miranda* v. *Arizona*, 384 U. S. 436 (1966).[4] *Miranda* similarly hangs on by its *stare decisis* fingernails, retained because it has "became imbedded" rather than because of its reasoning. See *Dickerson* v. *United States*, 530 U. S. 428, 443 (2000). As with *Mapp*, many decisions have been necessary to limit the damage. See *Harris* v. *New York*, 401 U. S. 222, 226 (1971) (use for impeachment); *New York* v. *Quarles*, 467 U. S. 649, 657 (1984) (public safety exception); *Oregon* v. *Elstad*, 470 U. S. 298, 309 (1985) (second statement as "fruit"); *United States* v. *Patane*, 542 U. S. 630, 644 (2004) (plurality opinion) (physical evidence as "fruit"); *id.*, at 644-645 (Kennedy, J., concurring in the judgment) (same).

Legislative bodies as well have shown less willingness over the years to create or expand exclusionary rules and more willingness to cut back on them. As far back as 1968, Congress showed deep ambivalence in the Omnibus Crime Control and Safe Streets Act. The Act included Congress's ill-fated attempt to overrule *Miranda*. See *Dickerson*, 530 U. S., at 435-436. In the same act, Congress *did* abrogate, or at least substantially limit, the nonconstitutional *McNabb-Mallory* rule.[5] See 2 W. LaFave, J. Israel, & N. King, Criminal Procedure § 6.3(b), pp. 472-474 (2d ed. 1999). Petitioner curiously relies on a rule repudiated by Congress 38 years ago as his example of a long-standing requirement of suppression for nonconstitutional rules. Brief for Petitioner 37-38; accord NACDL/LCA Brief 6-7. Although the three views of 18

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4. The indubitable exclusionary rule, in contrast, is *Brown* v. *Mississippi*, 297 U. S. 278 (1936). A confession which was actually coerced is bad evidence, and its exclusion furthers rather than hinders the search for truth.

5. *McNabb* v. *United States*, 318 U. S. 332 (1943); *Mallory* v. *United States*, 354 U. S. 449 (1957).

U. S. C. § 3501(c) described by LaFave, *et al.*, dispute how much of the rule Congress actually abrogated, there is no doubt that some violations of the rule in question are no longer remedied by exclusion.

In Title III of the 1968 Act, Congress did create an exclusionary rule for electronic surveillance. See 18 U. S. C. § 2515. However, by 1986 Congress had decided to go no further. Congress amended the Act to cover a broad range of electronic communications but precluded exclusion as a sanction. See 2 W. LaFave, *et al.*, *supra*, § 4.6(a), at 388; 18 U. S. C. § 2518(10)(c). LaFave finds this a "curious distinction" from prior law, but the reason for it is not difficult to see. While there is not yet sufficient political momentum to repeal the existing Title III exclusionary rule, Congress could and did agree not to expand it any further.

In 1982, the people of America's largest state emphatically rejected exclusionary rules by direct vote. Article I, § 28(d), of the California Constitution created a right of the people to truth in evidence, abrogating the judicially created state-law exclusionary rules existing at that time. See *In re Lance W.*, 37 Cal. 3d 873, 879, 694 P. 2d 744, 747 (1985). The same initiative added § 29, providing that the people, as well as the defendant, have a right to due process of law. Cf. *Stein* v. *New York*, 346 U. S. 156, 197 (1953) (Jackson, J.), overruled on other grounds, *Jackson* v. *Denno*, 378 U. S. 368, 391 (1964). It is a sad commentary on American jurisprudence that such a declaration is necessary, but it is. When valid, probative evidence favorable to defense is suppressed, that is a denial of due process of law, see *Chambers* v. *Mississippi*, 410 U. S. 284, 302-303 (1973), yet petitioner asks this Court to do exactly that to the people of Oregon.

Nothing in the Vienna Convention, as construed by the *Avena* decision, requires this drastic sanction. See Part I, *supra*. In the absence of a requirement imposed by a federal treaty or statute or by the Constitution itself, this Court simply has no authority to direct a state court to exclude evidence. See

Dickerson, 530 U. S., at 438-439. Far from being a universal or time-honored remedy, exclusion is a discredited relic of a bygone era. It should not be extended to a new area, particularly when this Court's authority to do so is doubtful.

III. The international cases do not support a mandatory rule of suppression as a remedy for a consular notification violation.

Amici National Association of Criminal Defense Lawyers and Law Council of Australia (NACDL/LCA) cite several cases from Australia and the United Kingdom that they say support a suppression remedy in this case. See NACDL/LCA Brief 16-23. Before discussing these cases, it is important to note a distinction between this use of international cases and other controversial uses.

In *Roper* v. *Simmons*, 543 U. S. 551, 125 S. Ct. 1183, 1198-1200, 161 L. Ed. 2d 1, 25-27 (2005), the Court looked to contemporary international sources in deciding whether execution of persons for crimes committed while under the age of 18 violated the Eighth Amendment to the Constitution of the United States. This usage was controversial, to put it mildly. See *id.*, at 125 S. Ct., at 1225-1229, 161 L. Ed. 2d, at 60-64 (Scalia, J., dissenting); Posner, The Supreme Court—Foreword: A Political Court, 119 Harv. L. Rev. 32, 84-85 (2005).

Use of international law in construing a treaty is quite different. See Posner, *supra*, at 85. A treaty is a contract among nations. Interpretations of its terms by courts of other parties to the treaty are unquestionably relevant and worth examining. See *El Al Israel Airlines, Ltd.* v. *Tsui Yuan Tseng*, 525 U. S. 155, 175-176 (1999).

One hundred and sixty-eight countries are parties to the Vienna Convention on Consular Relations. Brief for Petitioner 2. If the courts of over 100 of those countries, or even a heavy majority of the major developed countries with mature legal

systems, had interpreted the treaty to categorically forbid the introduction of a statement into evidence when the consular information and notification provisions had not been complied with, that would be a weighty argument that exclusion is a treaty obligation of the United States. *Amicus* CJLF has not found such a consensus, and neither petitioner nor his supporting *amici* have demonstrated one.

The Government of the United Mexican States has filed an *amicus* brief in support of petitioner. Six pages of that brief are devoted to the argument that suppression of evidence should be granted as a remedy. See Brief for Government of the United Mexican States as *Amicus Curiae* 24-30. What is most remarkable about this argument is not what it says, but what it does not say. There is no citation to a case where a court of Mexico has suppressed a statement as a remedy for a Vienna Convention violation. There is no statement by the government of Mexico that it has provided such a remedy in the past and no commitment that it will provide such a remedy in the future. Unless Mexico has achieved 100% compliance with Vienna Convention requirements among its police force, which is exceedingly unlikely, there are violations, and one would expect to see Mexico's suppression remedy cited in this brief if it existed. The brief submitted by the European Union similarly does not cite a single case in which any of its member nations has suppressed a statement on this ground. Of all the briefs submitted in support of the petitioner, only the NACDL/LCA brief makes any attempt to show that *any* other countries have suppressed evidence in cases such as this, but even the few cases they cite fall far short of the mark.

The Australian cases must be considered in light of the Crimes Act of 1914,[6] which provides by statute for many of the same rights which this Court has provided by case law. Sections 23F and 23G provide for warnings, counsel, and a

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6. The Crimes Act is available on the Australian government Web site at http://scaleplus.law.gov.au/html/pasteact/browse/TOCCR.htm.

qualified right to remain silent along the general lines of the *Miranda* v. *Arizona*, 384 U. S. 436 (1966) line of cases. In addition, section 23P(1) codifies the Vienna Convention requirements of information of rights and notification of the consulate on request. Most importantly, section 23P(2) creates a statutory requirement that *Avena* held is *not* required by the Vienna Convention. If the arrestee wishes to contact the consulate, the police must refrain from interrogation until he has had a reasonable opportunity to do so. Cf. *Case Concerning Avena and other Mexican Nationals* (*Mex.* v. *U. S.*), 2004 I. C. J. No. 128, ¶ 87 (Judgment of Mar. 31) (no such requirement).

Amici NACDL and LCA cite three state and territorial cases in which, they say, "Australian courts have applied suppression or exclusion as the remedy for breaches of, inter alia, consular communication rights." NACDL/LCA Brief at 19 (citing *Regina* v. *Tan*, [2001] W.A.S.C. 275 (W. Austl. Sup. Ct.)); *Regina* v. *Su*, [1997] 1 V.R. 1 (Sup. Ct. Vic.); *Tan Seng Kiah* v. *Regina*, [2000] 10 N.T.L.R. 128 (N. Terr. Ct. Crim. App.). *Amicus* CJLF claims no expertise in Australian law, but we can safely presume that an LCA brief in support of the petitioner will cite the strongest authority available from that country for a suppression remedy for Vienna Convention violations. Upon closer examination, these cases provide very little support.

The earliest of the cases, *Regina* v. *Su*, *supra*, was a drug smuggling case. The case is complex, so some detail is required to understand its implications, or lack of them, for the present case.[7] "The six accused comprised three Japanese brothers Yoshio, Masahru and Mitsuo Katsuno, two other Japanese nationals Asami and Honda, and a Malaysian, Su." *Su*, *supra*, at 1. The interrogation questions involved Yoshio Katsuno. The holdings are summarized in headnotes (11) to

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7. *Amici* NACDL/LCA simply cite this long, complex case in its entirety, without a point page.

(14). See *id.*, at 4. The convictions of the other five were affirmed. See *ibid.*, headnote (15).

Yoshio was interviewed four times, and the records of three of the interviews were introduced as evidence. He was interviewed by an immigration official upon arrival at Melbourne Airport, by police Detective Obers shortly thereafter, by the detective again several hours later, and by the detective a third time three days later at police headquarters. See *id.*, at 44. The court found he was not under arrest at the time of the immigration interview, so no warnings were required. See *id.*, at 49.

The court found Yoshio was under arrest at the time of Obers' first interview, and therefore the *Miranda*-type warnings were required by sections 23F and 23G. The trial judge's finding that the statements were voluntary was upheld on a deferential standard, but that was not the end of the matter. The court had to consider exclusion on grounds of unfairness or public policy. See *id.*, at 53-54. The detective attempted to give the 23F advisement of the right not to say anything and that a statement may be used in evidence, but the translator failed to effectively communicate the second part to Yoshio. See *id.*, at 46, 54. The detective completely failed to comply with the 23G requirement of advice regarding contact with friend, relative, or lawyer. See *id.*, at 54. The court then proceeded to consider whether these deficiencies required exclusion in the circumstances of the case (which is not required for every violation), and the court ultimately concluded they did. See *id.*, at 54-55.

Conspicuous by its absence from this entire discussion is *any* mention of section 23P or the Vienna Convention. On the path to deciding that the *Miranda*-type violations render admission unfair, the court mentions the fact that the arrestee was a foreigner, unfamiliar with Australian police procedures, see *id.*, at 55, but consular notification is nowhere mentioned.

The second interview presented a *Mallory*[8]-type question. The police had not taken Yoshio before a magistrate within the time required by section 23C of the Crimes Act. See *id.*, at 55. In addition, they had not correctly documented their compliance with the public safety exception allowing them to delay access to counsel. See *id.*, at 56-58. The important fact for this case, though, was that they *did* comply with section 23P, and therefore with the Vienna Convention. "Before the police began this interview they permitted Yoshio to see a Japanese consular official. *Thus no question of any contravention of s. 23P of the Crimes Act arises.*" *Id.*, at 56 (emphasis added). The same is obviously true of the last interview, and consular notification is not mentioned. See *id.*, at 58-59.

Regina v. *Su* is a fascinating read in comparative criminal procedure, but it provides no support whatever for the petitioner's position in the present case. The interviews in question were suppressed on grounds analogous to well-established rules of American law, *Miranda* and *Mallory*. No violation of section 23P or the Vienna Convention was found by the court, and no evidence was suppressed on that ground.

Regina v. *Tan*, [2001] W.A.S.C. 275 has some relevance, but very slight. The judge found that the police had violated five different sections of the Crimes Act. See *id.*, ¶ 56. They included sections 23F, 23G, and 23P discussed above, section 23N regarding interpreters for persons with limited English skills, and section 23V which makes tape recording mandatory when practical. Unlike the other sections, section 23V expressly makes noncompliance a ground for exclusion. See *Regina* v. *Su*, *supra*, at 54.

The judge in *Tan* does not discuss consular notification other than the passing mention of section 23P in paragraph 56. He simply holds that this conglomerate violation of nearly every rule in the book justifies exclusion. He relies primarily

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8. *Mallory* v. *United States*, 354 U. S. 449 (1957).

on *Su*, which is not a consular notification case. See *Tan*, ¶¶ 58-59. There can be little doubt from reading this decision that the 23P violation was not necessary to the outcome. If the arrestee had not been a foreigner, so that section 23P did not apply, the evidence would still have been excluded on these facts. *Tan* is much too slender a reed to support the proposition that Australian courts would exclude a statement for violation of section 23P *alone*, which would be more closely analogous to the question in this case.

Tan Seng Kiah v. *Regina*, [2001] 10 N.T.L.R. 128 contains language pertinent to the present case, quoted in the NACDL/LCA Brief, at 19-20, but again we see that the circumstances are quite different. Difficulty obtaining a Mandarin interpreter caused the police to exceed the section 23C time limit, which the trial judge found excusable but the appellate court did not. See *id.*, ¶ 32. The arrestee was informed of both his right to counsel and his right to consular notification, and he invoked both, but neither was provided before interrogation. See *id.*, ¶¶ 22-23. The compound effect of these three violations were then weighed in a discretionary decision and found to outweigh the seriousness of the offense (drug smuggling), and the evidence was excluded. See *id.*, ¶¶ 67-68,72.

The first distinction to note in *Tan Seng Kiah* is that there was no violation of the Vienna Convention in this case. The arrestee was informed of his right to consular notification on the day of arrest, a Saturday, and he invoked it. See *id.*, ¶ 22. The failure of the police to actually notify the consulate prior to a series of interrogations concluding the following Monday is not a violation according to the *Avena* decision. See *supra*, at 6; *Avena*, *supra*, ¶¶ 87, 97 (no requirement of notification before interrogation; five days/three working days is sufficiently prompt notification). The case is about an additional requirement of notification before interrogation that the Australian Parliament has chosen to impose, not a requirement that follows from Australia's accession to the Convention.

Neither Congress nor the Oregon Legislature has chosen to impose such a requirement on the Oregon police.

The other distinction, as in *Su* and *Tan*, is that the statement was not excluded on the basis of the 23P violation alone. Rather, it was excluded on a combined basis with other violations that by themselves would have been sufficient to exclude it in the United States.[9]

Amici NACDL and LCA state that "courts in the United Kingdom have concluded that failure to inform detained foreigners of their consular rights warranted the discretionary remedy of exclusion." NACDL/LCA Brief 21. Yet they cannot cite a single decision in an official or quasi-official case reporter to support that proposition. The best they can find is two case notes in a bulletin of an advocacy group, describing two trial court decisions apparently by the same judge. See *id.*, at 21-22. They cite *Regina* v. *Bassil and Mouffareg* (Acton Crown Court, 1990), noted in Legal Action 23 (Dec. 1990), and *Regina* v. *Van Axel and Wezer* (Snaresbrook Crown Court, 1991), noted in Legal Action 12 (Sept. 1991).

It goes without saying that the opinion of a single trial court judge is not a reliable indication of the jurisprudence of a nation. See, *e.g.*, *Newdow* v. *Congress of the United States*, 383 F. Supp. 2d 1229 (ED Cal. 2005), appeal pending, No. 05-17344 (CA9) (Pledge of Allegiance unconstitutional). Even accepting these case notes at face value for the sake of argument, however, they do not indicate that an exclusionary remedy is a national obligation of signatories to the Vienna Convention. Indeed, they do not even mention the Vienna Convention. They are based on national law, which the British

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9. *Foo* v. *The Queen*, [2001] N.T.C.C.A. 2 (N. Terr. Ct. Crim. App.), cited by *amici* with a "see also" signal, found no violation on the facts of the case. See *id.*, ¶ 44. The opinion therefore says nothing about whether the evidence would have been suppressed if a violation had been established.

Parliament, like the Australian Parliament, may have enacted for reasons other than a treaty obligation to do so.

For the position of the United Kingdom on the exclusion of evidence as a remedy for a treaty violation, it may be enlightening to look to the House of Lords, even if we cannot find a decision specifically on the Vienna Convention. In *Regina* v. *Khan*, [1996] 3 All E. R. 289, the defendant sought to suppress a tape recording obtained through a covert listening device on the grounds, among others, that the taping violated Article 8 of the European Convention on Human Rights. The principal opinion by Lord Nolan relies on a decision of the European Court of Human Rights rejecting the proposition that the Convention requires exclusion of evidence obtained in violation of it. *Id.*, at 300-301 (citing *Schenk* v. *Switzerland*, 13 E.H.R.R. 242 (1988)). Lord Nolan concludes "that the [trial] judge was fully entitled to hold that the circumstances in which the relevant evidence was obtained, even if they constituted a breach of art 8, were not such as to require the exclusion of the evidence." *Id.*, at 302.[10]

With a world of decisions to choose from, all that *amici* NACDL/LCA have produced is a handful of decisions in which a mix of policy choices applied to a mix of violations has produced a decision to suppress a statement. Not a word in any of these sources says or implies that the Vienna Convention itself required the suppression. If and when Congress enacts implementing legislation, as the Australian and British Parliaments have done, then it will be proper for this Court to decide whether that legislation requires a suppression remedy. Until then, the only question within this Court's jurisdiction is

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10. The British attitude toward the exclusionary rule generally is evident in the next paragraph. "It would be a strange reflection on our law if a man who has admitted his participation in the illegal importation of a large quantity of heroin should have his conviction set aside on the grounds that his privacy has been invaded." *Ibid.*

whether the treaty itself does, and nothing in the cases cited supports an affirmative answer.

The question before this Court is not whether suppression of petitioner's statement would have a salutory effect on the United States' reputation among the international legal community. The question this Court has jurisdiction to decide is whether suppression is *required* by a duly ratified treaty. See 28 U. S. C. § 1257(a). *Avena* does not so hold, and neither does any decision by any court in any country cited by petitioner or supporting *amici*. There is no legal basis for requiring the courts of Oregon to suppress evidence and thereby blind themselves to the facts of this case.

CONCLUSION

The decision of the Supreme Court of Oregon should be affirmed.

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Respectfully submitted,

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